**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **JERYL S. AYERS** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,031,599 |
| **CLEAR CHANNEL COMMUNICATIONS** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **INSURANCE COMPANY OF THE STATE** | ) | |
| **OF PENNSYLVANIA** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent appeals the September 29, 2008, preliminary hearing Order of Administrative Law Judge John D. Clark (ALJ). Claimant was granted medical equipment as listed in the August 7, 2008, report of claimant's treating physician, John D. Osland, M.D., after the ALJ determined that claimant's work-related injury of April 4, 2006, accelerated her need for this equipment, regardless of claimant's many preexisting medical problems.

Claimant appeared by her attorney, Dennis L. Phelps of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Vincent A. Burnett of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held June 26, 2007, with attachments; the transcript of Preliminary Hearing held September 2, 2008, with attachments; the evidentiary deposition of John Osland, M.D., taken September 18, 2008, with attachments; and the documents filed of record in this matter.

## ISSUE

Is claimant's need for the wheelchair, apparatus and other equipment recommended by Dr. Osland in his letter of August 7, 2008, causally related to claimant's work injury of April 4, 2006, or is claimant's need for that equipment related to the non-work-related injury on October 13, 2007?

## FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant had been an employee of respondent for 15 years. On April 4, 2006, she was the sales office manager, supervising approximately 25 employees. On that date, she suffered a work-related injury when her right foot became tangled in the carpet and she fell. Claimant fractured her right femur and scapula in the fall. The scapula injury resulted in no lasting injury. The femur fracture required an open reduction and internal fixation, with a plate and 12 screws being inserted. The surgery was performed by board certified orthopedic surgeon John D. Osland, M.D. Claimant was confined to bed rest for approximately 5 months.

Claimant was referred for physical therapy and alternated between using a walker and a wheelchair. Claimant pulled a muscle during physical therapy which slowed her recovery. Claimant also developed a skin breakdown on her buttocks from the long bed confinement, which further delayed her recovery. Ultimately, claimant approached maximum medical improvement (MMI) and was scheduled for a release approximately 8 weeks from her August 30, 2007, visit with Dr. Osland. However, on October 13, 2007, claimant suffered a fall at home, fracturing her right hip. The parties have stipulated that this injury was not related to claimant's job with respondent, or to the April 4, 2006, injury. This intervening injury even further slowed claimant's recovery from the work-related injury.

Ultimately, claimant reached MMI and, in a letter from Dr. Osland, dated February 17, 2008,[1] claimant was assessed a 23 percent right lower extremity impairment, pursuant to the fourth edition of the AMA *Guides*.[2] In that same letter, Dr. Osland also recommended a motorized wheelchair, a ROHO cushion for the wheelchair, a Rollator walker, bedside commode, ADA approved ramp for claimant's home and an attachment for claimant's car for transportation of the wheelchair.

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[1] Osland Depo., Ex. 1.

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

In a followup letter dated August 7, 2008,[3] Dr. Osland recited the same wish list of equipment for claimant, and added that the need for this equipment had been accelerated by the femur fracture. In that same letter, addressed to claimant's counsel, Dr. Osland stated that the need for the equipment was not impacted by the hip fracture. However, in his deposition taken on September 18, 2008, Dr. Osland testified that the hip fracture accelerated claimant's need for the equipment, and the femur fracture and hip fracture were both partially responsible for the claimant's need for the equipment.[4]

Claimant's medical history is significant in that she has suffered from ankylosing spondylitis her entire life. This is a disabling disease process which causes the bones to calcify, can create marked decreases in motion and can cause significant and chronic pain. Claimant also has been diagnosed with osteoporosis and vasculitis. Prior to the fall in April 2006, claimant was on significant narcotic medication, but was not using a wheelchair. A report dated March 2, 2006, from her treating rheumatologist, Teresa A. Reynolds, M.D., cautioned that claimant's job was becoming too much for her as she was coming home exhausted. Claimant was advised to stop work or, at the very least, cut her workday in half, with the remaining half to be spent at home on the computer. At the time of Dr. Reynolds' examination, claimant weighed 168 pounds. At the time of Dr. Osland's examination in August 2007, claimant's weight had dropped to 102 pounds.

Claimant was referred by respondent's attorney to board certified neurological surgeon Paul S. Stein, M.D., for an examination on May 15, 2008. Dr. Stein described claimant as being 5' 1" in height and weighing 150 pounds. Dr. Stein was asked to review the equipment recommendations of Dr. Osland, which he agreed with. He was also asked to consider whether the need for those devices is related to the work incident of April 4, 2006, or the fall on October 13, 2007. The following is Dr. Stein's response from his report of May 15, 2008:

> The question has been asked as to whether the need for these devices is related to the work incident of 4/4/06. There is more than one way to look at that from a medical viewpoint. I will provide my best input in this regard and it will then be up to the attorneys and/or the court to determine legal aspects of responsibility. Firstly, had Ms. Ayers not had the preexisting ankylosing spondylitis and osteoporosis it is unlikely that the fall of 4/4/06 would have resulted in the need for such medical equipment. In fact, the fall might not have resulted in a fracture except for the preexisting status. Additionally, her preexisting status with difficulty related to the right lower extremity, may well have contributed or caused the fall itself. It is also likely that Ms. Ayers would, at some time, have a requirement for such equipment absent that fall, based upon her preexisting medical status. It is more likely than not that the fall of 4/4/06 accelerated the need for such equipment. Additionally, the

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[3] Osland Depo., Ex. 1.

[4] Osland Depo. at 37-38.

> subsequent hip fracture of 10/17/07 which is not work-related is a substantial contributory factor to the current need for this equipment. It is quite likely that the hip fracture of October, 2007, alone would require this equipment, even if the injury of 4/4/06 had not occurred.[5]

Dr. Osland was asked whether claimant's need for the equipment would have been the same had she not had the hip fracture. He responded: "I think she still would have needed these things. Some of it's due to her ankylosing spondylosis, some of it's due to the femur, but she certainly was going to need those things."[6] He was then asked if the October 2007 hip fracture accelerated the need for the equipment. He responded: "Well, it certainly didn't – I think she was going to need them regardless and I think it made her realize that she needed them more and so I think it probably did accelerate – it certainly didn't slow the need down."[7]

## PRINCIPLES OF LAW AND ANALYSIS

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[8]

Claimant contends that the Board does not have jurisdiction to consider this matter as respondent has not contested the compensability of this matter. Normally, that position would be correct. However, in this instance, respondent has argued that the injury of October 13, 2007, acts as an intervening injury and the responsibility for claimant's injuries and the need for the medical equipment should end as of the date of that accident. This

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[5] P.H. Trans., Cl. Ex. 2.

[6] Osland Depo. at 22-23.

[7] Osland Depo. at 23.

[8] K.S.A. 44-534a(a)(2).

raises the issue of whether claimant's need for medical treatment stems from an accident which arose out of and in the course of her employment with respondent or whether it is the result of an intervening injury. Over this issue, the Board does have jurisdiction.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[9]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[10]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[11]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[12]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[13]

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[9] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[10] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[11] K.S.A. 2005 Supp. 44-501(a).

[12] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[13] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

K.S.A. 2005 Supp. 510h(a) states:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.[14]

Claimant requests that respondent provide medical equipment necessary to relieve claimant from the effects of the April 4, 2006, injury. Respondent points to the intervening injury accident of October 13, 2007, as the real cause for the need for the equipment. Both Dr. Stein and Dr. Osland point fingers in multiple directions, finding the equipment need stems from claimant's preexisting conditions, the fall of April 4, 2006, and the October 13, 2007, accident. However, both doctors find the fall of April 4 to have accelerated the need for the medical equipment. The ALJ also determined the need for the equipment stemmed, at least partially, from the April work-related injury. This Board Member agrees, although this determination is incredibly close. For preliminary hearing purposes, the finding by the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

## CONCLUSIONS

Although very close, claimant did prove, by a very slim preponderance of the evidence, that her need for the medical equipment recommended by Dr. Osland was caused, at least partially, by the accident of April 4, 2006, and respondent is responsible for the providing of that equipment.

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[14] K.S.A. 2005 Supp. 44-510h(a).

[15] K.S.A. 44-534a.

## DECISION

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated September 29, 2008, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this ____ day of January, 2009.

HONORABLE GARY M. KORTE

c: Dennis L. Phelps, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge